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In The

Supreme Court of the United States

October Term, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY,

v. *Appellants,*

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY,

v. *Appellants.*

RICHARD H. C. TAYLOR,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY,

v. *Appellants.*

RICHARD H. C. TAYLOR,

Appellee.

On Appeal from the Supreme Court of the Commonwealth of Virginia

BRIEF ON BEHALF OF THE APPELLEES

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BRIEF ON BEHALF OF THE APPELLEES

QUESTIONS PRESENTED

1. Whether the constitutional validity of Va. Code § 19.2-266 was sufficiently drawn in question to support this Court's exercise of appellate jurisdiction under 28 U.S.C. § 1257(2).

2. Whether the circumstances of this case provide an adequate basis upon which this Court should grant a writ of certiorari under 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103.
3. Whether the First Amendment affords the public or press a right to attend criminal trials.
4. Whether the Sixth Amendment embodies a public right of access to criminal trials.
5. Whether the First and Sixth Amendment taken together afford a public right of access to criminal trials.
6. Whether the trial court gave appropriate deference to any constitutional right of access to criminal trials in its decision to close the trial.

STATEMENT OF THE CASE

John Paul Stevenson (hereinafter, "Stevenson") was indicted for murder in March of 1976 and was convicted in the Circuit Court of Hanover County (hereinafter, "trial court") on July 16, 1976 of second degree murder.[1] On October 7, 1977 the Supreme Court of Virginia reversed this conviction and remanded the case for a new trial. *Stevenson* v. *Commonwealth,* 218 Va. 462, 237 S.E.2d 779 (1977). The conviction was reversed because a blood stained shirt purportedly belonging to Stevenson was improperly admitted into evidence. Laboratory tests had revealed that the stains on the shirt matched the blood of the victim. The Supreme Court of Virginia found that this shirt was improperly received in evidence at the original trial because it was "connected" to the accused solely by hearsay evidence. *Id.*[2]

[1] As noted in the Jurisdictional Statement of the Appellants, at page 7, the statement of facts contained in Appellants' Memorandum in Support of Petitions for Writs of Mandamus and Prohibition before the Virginia Supreme Court was accepted by counsel for appellee. Such agreement on the facts is not possible before this Court due to the argumentative nature of the Appellants' statement of the case.

Stevenson's second trial ended in a mistrial on May 30, 1978 (Va. App. 3),[3] because a juror asked to be excused due to a nervous condition. (App. 34a). A newspaper article published by the Richmond *Newsleader* the day following the declaration of the mistrial explained that Stevenson had been previously convicted, that a new trial had been ordered by the Virginia Supreme Court because of improper admission of a "key piece of evidence" at the original trial—"a blood stained shirt obtained from Stevenson's wife soon after the killing." (App. 34a).

A third trial began on June 6, 1978, but that proceeding also ended in a mistrial. (Va. App. 4). A mistrial was declared in this instance because a prospective juror had read about Stevenson's previous trials and had related his knowledge about the case to the other prospective jurors. (App. 35a-36a). A Richmond *Newsleader* article published the day following the second mistrial stated that Stevenson had been convicted previously and that the conviction was overturned because of evidence improperly introduced during the original trial. (App. 35a-36a).

Stevenson's fourth trial began on September 11, 1978. At the outset, Stevenson's defense counsel moved to exclude the public and press from the courtroom during the trial "because I don't want any information being shuffled back

[2] The prosecution did not attempt to introduce the blood stained shirt at the subsequent re-trials but the existence of this inadmissible and highly prejudicial evidence was publicized in the newspapers at the time of the second trial. (App. 34a).

[3] Page number references to the Appendix filed by the Appellants in the Virginia Supreme Court in these consolidated cases will be designated (Va. App. . . .) to distinguish such references from the Appendix filed with this Court.

and forth when we have a recess as to what—who testified to what." (App. 5a). The Commonwealth's Attorney did not object to the proposed closure. (App. 6a). The trial court granted the motion stating that "the statute gives me that power specifically and the defendant has made the motion and I'll rule that the courtroom be kept clear of all parties except witnesses when they testify." (App. 6a). Appellants Wheeler and McCarthy, who were present in the courtroom, were required to leave, but the record reflects no objection on their part at that time. (App. 5a-6a). Later that same day, counsel for Appellants was granted an opportunity to oppose the motion and order closing the trial to the public and press. Written and oral arguments were presented by counsel urging the court to open the trial to the press and public. (App. 8a-15a). Appellants counsel argued that the exclusion order was a form of prior restraint on freedom of the press in violation of the First Amendment. (App. 8a-12a). Appellants also suggested that other measures were available to ensure a fair trial. (App. 12a). Appellant's counsel made no challenge to the constitutionality of Va. Code § 19.2-266.

Stevenson's defense counsel argued that "this is the fourth time that we've . . . attempted to have a trial", that "we've had difficulty . . . with information . . . between jurors," and that "on two previous occasions your honor declared a mistrial and that was the reason why I wanted to avoid [continually] coming back up to this Court and . . . having to try this case." (App. 14a-15a). Stevenson's counsel further contended that a courtroom open to the press and the public would jeopardize his client's right to a fair trial in that publicity was a particularly acute problem in such a small community. (App. 15a).

The trial court stated that it had "to weigh, . . . in its own

mind, . . . the rights of the defendant as against the rights of the public or the rights of the defendant as against the rights of the press." (App. 12a-13a). Judge Taylor also noted that the courtroom layout was such that spectators tended to be distracting to the jury. (App. 16a). Considering the circumstances presented and the factors raised by counsel at this mid-trial hearing,[4] Judge Taylor declined to vacate his closure order. (App. 17a).

The Appellants petitioned the Supreme Court of Virginia for Writs of Mandamus and Prohibition and filed an appeal from the closure order. The Court denied relief in all three cases, citing without comment *Gannett Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979). (App. 24a-28a).

The instant appeal is from those judgments of the Supreme Court of Virginia. Appellants attack the constitutionality of Va. Code § 19.2-266 for the first time in this Court.

SUMMARY OF ARGUMENT

I.

To establish appellate jurisdiction in this Court, it has long been required that there be an explicit and timely insistence in state courts that a state statute is repugnant to the federal Constitution, treaties or laws, of the United States. A general attack on the constitutionality of actions under a statute does not meet this jurisdictional requirement. Not once in Virginia courts did the Appellants even mention Va. Code § 19.2-266, let alone challenge its constitutionality. Such failure, of itself, prevented not only constitutional review of the statute in the Supreme Court of Virginia, but, also makes such review improper in this Court.

[4] Though not perfectly clear from the record, this hearing on closure took place after the completion of the first day of trial and after the jurors had been released for that day.

Certiorari is not an appropriate alternative in this case. Its grant would virtually nullify the appellate jurisdiction requirement that only the federal questions raised and decided below may be considered by this Court. Moreover, such a grant of certiorari would be in complete derogation of the principles of comity. The invitation to establish a right of access to criminal proceedings in light of this Court's recent decision in *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979), should be declined in order that state courts and legislatures may react to the effects of *Gannett* perceived by appellants. To establish a new constitutional right of public access after only six months experience under *Gannett,* without any credible data on its effects, is not warranted. If such a constitutional requirement is truly necessary, that will become apparent once the States have had an adequate time to consider this issue and to render their judgment upon it. This Court should not establish new constitutional rights where the need is not proven and the consequences are unknown.

II.

The traditionally recognized First Amendment rights are not in issue in this case. The Appellants assert a First Amendment right of access—the right to attend criminal trials. The decisions of this Court have uniformly rejected claims that the First Amendment guarantees either the public or press a right of access to governmental places and information. Recognition of such rights of access would present significant practical problems which do not lend themselves to resolution by means of any reasonable constitutional principle.

Our tradition of public criminal trials, though well established, does not thereby create a constitutional right in

the public or press to demand public trials. Indeed, the custom of publicity suggests there is no pressing need to recognize the novel rights of public access asserted by the Appellants in this case.

The central purpose of criminal trials is fair adjudication of the accused. Trial closures, where deemed necessary by the accused, prosecutor and judge to ensure a fair trial would not disserve the central societal purposes of criminal trials. Accordingly, there is no discernible basis upon which to establish a public right of access to criminal trials.

III.

Similarly, the Sixth Amendment embodies no public right of access to criminal proceedings. While there exists a common law tradition of open civil and criminal proceedings, this Court in *Gannett* refused to ascribe constitutional dimension to this tradition, finding no evidence that the framers of the Sixth Amendment intended to create any Constitutional right of access in the public.

In any criminal proceeding, the ultimate concern is for the accused's right to a fair trial, the most fundamental of all freedoms. Thus, this right of the accused is paramount to any societal interest in a public trial. While the press should normally have the opportunity to observe judicial proceedings, that opportunity must yield whenever necessary to maintain absolute fairness in the judicial process. To ensure such fairness, trial judges have an affirmative duty to protect the rights of the accused and rightfully possess broad discretion in fulfilling this obligation.

The public also may have important interests in criminal trials but recognition of such interests is a far cry from the creation of a constitutional right on the part of the public

to attend criminal proceedings. Moreover, in an adversary system of criminal justice the public interest is protected by the trial participants. The workability of our system is based upon the assumption that these participants will competently and honestly meet their responsibilities. The responsibility of the prosecutor fully encompasses a duty to protect the societal interest in a public trial.

At times trial closure will be necessary to protect the accused's right to a fair trial. Any public concern in limiting the use of such closures can be adequately protected by the political process and does not justify creation of new constitutional rights.

IV.

Neither the First nor the Sixth Amendment alone provides a basis for a public right of access to criminal trials. Nor do these Amendments taken together support such a right. Since First and Sixth Amendment rights are not interdependent and are often in conflict in criminal trials, the cases relied upon by Appellant are inapposite.

V.

Even if a Constitutional right of access exists, the trial court gave this right all appropriate deference in balancing it against the accused's right to a fair trial. Though no objection by the Appellants was made to the closure order, the trial court nevertheless afforded them a mid-trial hearing. The court assumed the public had a constitutionally protected right to attend, but found that the right of the accused to a fair trial outweighed Appellants' interests. Though alternatives to closure were suggested by Appellants, they obviously were no longer viable under the circumstances. Substantial reasons were advanced in support

of closure, yet Appellants offered no countervailing evidence to overcome these bases for closure.

The "all-but-conclusive" presumption against closure urged by the Appellants is unworkable and would, in effect, prohibit all closures. The trial courts balancing of the competing interests herein was constitutionally adequate.

ARGUMENT

I.

THE CASE IS NOT PROPERLY BEFORE THE COURT ON APPEAL, AND THE COURT SHOULD NOT GRANT CERTIORARI

A.

This Case Is Not Proper For Review On Appeal

It has long been established that this Court is only vested with appellate jurisdiction over those federal questions raised and decided in the state court below. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969); *Crowell* v. *Randell,* 10 Peters 368, 392 (1836). It is, therefore, essential to the jurisdiction of this Court under 28 U.S.C. § 1257(2) "that there be an explicit and timely insistence in state courts that a state statute, as applied, is repugnant to the federal constitution, treaties or laws." *Charleston Federal Savings and Loan Ass'n* v. *Alderson,* 324 U.S. 182, 185 (1944). Thus, in order to draw a state statute into question, it is insufficient to challenge action under a statute as being unconstitutional generally; the statute itself must be specifically challenged as being unconstitutional. *Hanson* v. *Denckla,* 357 U.S. 235, 244 (1958); *Garrity* v. *New Jersey,* 385 U.S. 493, 495-96 (1967); *Ungar* v. *Sarafite,* 376 U.S. 575, 582-83 (1964); *Monks* v. *New Jersey,* 398 U.S. 71 (1970). "[A]n attack on lawless exercise of authority in a particular case is not an attack upon the con-

stitutionality of a statute conferring the authority. . . ." *Phillips* v. *United States,* 312 U.S. 246, 252 (1941). Appellants sole argument below was that the actions of the trial court in closing the trial were precluded by the United States Constitution. The Appellants have not, therefore, drawn Va. Code § 19.2-266 into question under 28 U.S.C. § 1257(2). *Kulko* v. *California Superior Court,* 436 U.S. 84, 90 n. 4 (1978).

On appeal to the Supreme Court of Virginia Appellants did not mention Va. Code § 19.2-266, much less challenge it as being unconstitutional under the First, Sixth and Fourteenth Amendments.[1] Appellants rest their contention that there is appellate jurisdiction not upon any specific challenge they made to Va. Code § 19.2-266, but solely upon the trial court's reference to its statutory authority to close the trial and upon citations to Va. Code § 19.2-266 in the Memorandum of Respondent (Appellees herein) in Opposition to Petitions for Writs of Mandamus and Prohibition and the Brief in Opposition to Petition for Appeal filed in the Supreme Court of Virginia.[2] The controlling issue in deciding this Court's appellate jurisdiction, however, is whether the Appellants challenged the constitutionality of the Virginia statute in the courts below. *See Kulko* v. *California Superior Court, supra.*

Contrary to the assertion of the Appellants, the Supreme Court of Virginia did not "obviously and necessarily decide the constitutionality of Va. Code § 19.2-266,, both on its face and as applied." (Brief of Appellants at 16). The Court may well have based its decisions upon the plenary authority of courts to protect an accused's right to a fair

[1] *See* Petition for Appeal and Memorandum in Support of Petitions for Writs of Mandamus and Prohibition filed by Appellants in the Supreme Court of Virginia. *Also see* A.4a-20a.

[2] *See* Brief of Appellants at 16.

trial without regard to Va. Code § 19.2-266. The Virginia statute clearly was not the focus of the appeal. There was no challenge in the Virginia courts to the validity of the statute sufficient to invoke this Court's appellate jurisdiction.[3]

Virginia law requires that constitutional challenges to state statutes be made in trial courts. *King* v. *Commonwealth,* 219 Va. 171, 174, 247 S.E.2d 368, 370 (1978). *Rice* v. *Commonwealth,* 212 Va. 778, 779, 188 S.E.2d 196 (1972). Since no such challenge was made in the trial court, the constitutionality of Va. Code § 19.2-266 was not and could not be considered by the Virginia Supreme Court. *King* v. *Commonwealth, supra; Mid-State Equipment Co. Inc.* v. *Bell,* 217 Va. 133, 225 S.E.2d 877 (1976); *Rice* v. *Commonwealth, supra.* The decisions of this Court require that appellate review be denied under such circumstances. *Beck* v. *Washington,* 369 U.S. 541 (1962). In *Beck,* the Court stated:

> "although both opinions of the [State] Supreme Court discuss the *interpretation* of [the State statute] neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute. The

[3] Plaintiff's reliance on *Jenkins* v. *Georgia,* 418 U.S. 153 (1974) is misplaced. In *Jenkins* the Georgia Supreme Court directly and unequivocally upheld as constitutional the statute sought to be drawn into question on appeal. Similarly in *Cissna* v. *Tennessee,* 246 U.S. 289 (1918) the Tennessee Supreme Court dealt directly with the constitutional issue subsequently raised in this Court. In *Braniff Airways, Inc.,* v. *Nebraska State Board,* 347 U.S. 590 (1954) the statute involved was also explicitly challenged as unconstitutional below. Though this Court allowed a due process challenge on appeal while the constitutional challenge below was under the Commerce Clause, the Court specifically found that the factual basis for the due process challenge was identical to the Commerce Clause challenge below and was within the clear intendment of the Commerce Clause attack on the statute.

> [State] Supreme Court has unfailingly refused to consider constitutional attacks upon statutes not made in the trial court, even where the constitutional claims arise from the trial court's interpretation of the challenged statute. [Citation ommitted.] Petitioner's formal attack at the trial court level did not even mention [the State statute involved], much less argue that a restrictive interpretation would be unconstitutional under the Equal Protection Clause." *Id.* at 549-50. (Emphasis in original.)

As in *Beck* appellants herein did not challenge the constitutionality of Va. Code § 19.2-266 in the State trial court or the Virginia Supreme Court.[4]

Accordingly, the constitutional attack on Va. Code § 19.2-266 is not properly before this Court, and this appeal should be dismissed for want of jurisdiction.[5]

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[4] Appellants argue that it is not the rule in Virginia to require constitutional challenges to state statutes to be first brought before the trial courts. For this proposition Appellants rely on Virginia Supreme Court Rule 5:21 which provides that an objection not timely asserted below may, nevertheless, be considered "for good cause shown or to enable this court to attain the ends of justice." This exception has never been used and there is no indication that it was ever intended to allow a constitutional challenge to a state statute which was not raised at the trial level. None of the cases relied upon by appellants involved constitutional challenges to state statutes. *See* Brief of Appellants, p. 16, n. 10. Furthermore, though the specificity requirement for objections below may be waived, specificity remains essential to assignments of error on appeal. Rule 5:21. Appellant's failed to assign as error the trial court's arguable reliance on Va. Code § 19.2-266. This failure to "lay their finger on the error" is fatal to this appeal. *First National Bank of Richmond* v. *William R. Trigg, Co.*, 106 Va. 327, 342, 56 S.E. 158, 163 (1907); *Murphy* v. *Holiday Inns, Inc.*, 216 Va. 490, 219 S.E.2d 874 (1975).

[5] The Appellants alternatively argue that an appeal is proper even without a specific challenge to the statute contending that the decisions below create a statewide rule of court having the force of law in Virginia. This argument is completely devoid of merit. A rule of the Supreme Court of Virginia having general application may constitute a statute within the meaning of 28 U.S.C. § 1257(2). But *unreported* decisions of the Supreme Court denying petitions for appeal, mandamus, and prohibition in a single case are not legislative in character by any stretch of the imagination. There is no basis upon which to compare the actions of the Supreme Court of Virginia in adversary litigation to the legislative actions of State supreme courts in establishing rules for the integration of a state bar, amending statutory provisions governing criminal appeals, or promulgating rules for the administration of a state bar as Appellants would lead this court to believe. *See Lathrop* v. *Donohue*. 367 U.S. 820 (1961); *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971); *In re Griffiths*, 413 U.S. 717 (1973).

B.

Certiorari Should Not Be Granted In This Case

Appellants alternatively seek a writ of certiorari should the Court determine that there is an absence of appellate jurisdiction. Significantly, the Appellants relied in their Jurisdictional Statement exclusively upon this Court's appellate jurisdiction under 28 U.S.C. § 1257(2). Only now, after realizing their failure to properly establish appellate jurisdiction below, do they contend that there is an alternative basis for granting certiorari.

Though 28 U.S.C. § 2103 authorizes treatment of a jurisdictional statement as a petition for writ of certiorari, the requirement that this Court consider only federal questions passed upon by the state's highest court applies equally to petitions for certiorari. *Wilson* v. *Cook*, 327 U.S. 474 (1946). Underlying this requirement is the important principle of comity—the notion that "in the federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenges." *Cardinale* v. *Louisiana, supra,* at 439. The continuing importance of comity considerations cannot be denied. *Huffman* v. *Persue, Ltd.*, 420 U.S. 592 (1975); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977). Circumvention of this important principle in the instant case should not be

allowed. For these reasons, no writ of certiorari should be granted in this case to consider the constitutionality of Va. Code § 19.2-266.[6]

Other sound reasons exist supporting denial of certiorari in this case. The Appellants urge the Court to adopt admittedly new applications of the First and Sixth Amendments. They seek to establish a right to attend and observe criminal trials recognizing that no single provision of the Constitution expressly and unambiguously confers that right. (Brief of Appellants at 9). The Court is urged to establish this right because "our very survival as an open society requires no less." (Brief of Appellants at 13). In support of this broad claim Appellants refer to some eight instances in which courts have been asked to enter gag orders or closure orders since this Court's decision in *Gannett Co. Inc.* v. *DePasquale, supra.* (Brief of Appellants at 24, n. 21). Amici Curiae, *The Reporters Committee for Freedom of the Press, et al.,* ("Reporters" herein) in their appendix refer the Court to some limited data relating to closure orders entered since the announcement of this Court's opinion in *Gannett.* Such data, however, is of little value in assessing the effect of *Gannett,* if any, since similar data for comparable periods prior to the *Gannett* decision is not provided for comparison.[7]

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[6] Appellees contend that denial of certiorari is proper not only as to Appellants' challenges to Va. Code § 19.2-266 but also as to their constitutional challenges to the plenary authority of trial courts to close a trial to ensure the accused's right to a fair trial. The latter challenges were made below, but they were not saved in the questions presented in Appellant's Jurisdictional Statement. This failure prevents review of such constitutional questions. *See* Rules 15(c), 23(c) and 40(d)(2) of the Supreme Court of the United States, *Flournoy* v. *Wiener,* 321 U.S. 253, 263 (1944).

[7] Both Appellants and Amici Curiae argue that the data they have provided establishes the effects of this Court's decision in *Gannett.* Such trend analysis is obviously faulty because it is based upon a total lack of comparison data. Amici Curiae, Reporters, go so far as to say that "these initial closures are merely the hesitant beginning of an ever-increasing trend." (Brief of Amici Curiae, Reporters, at 12). Appellants characterize the data as showing that "*only recently* have any courts thought to exercise such grants of latent authority to cordon off entire criminal trials." (Brief of Appellants at 24). To the contrary, the first six cases mentioned by the Amici Curiae, Reporters, in their appendix indicate that closure motions had been used before this Court's decision in *Gannett.* To what extent the *Gannett* decision may have affected the practice of trial courts throughout the country is simply not shown by this insufficient data.

In the short time since *Gannett* was decided the vast majority of state legislatures have not been in session. Moreover, no other closure order by a trial court since *Gannett* has yet reached the appellate courts. *See* Appendix, Brief of Amici Curiae, Reporters. Thus, no accurate assessment of the effects of the decision in *Gannett* on trial closures is presented at this time.

Even if one assumes an increase in unwarranted closure orders in the wake of *Gannett,* the states may serve as effective laboratories in formulating a remedy which will protect the public's interest in open trials while not infringing on the accused's right to a fair trial. *Cf. New State Ice Co.* v. *Liebman,* 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting). This Court has often recognized the value of looking to the states for guidance when assessing the measure of constitutional restructuring necessary for effective administration of criminal justice.[8] Most dramatically this has been the approach of the Court in shaping the constitu-

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[8] *District of Columbia* v. *Clawans,* 300 U.S. 617 (1937) (determining what is a petty offense with respect to the right to trial by jury); *Wolf* v. *Colorado,* 338 U.S. 25 (1949) (determining that the exclusionary rule should not be applied to States); *Mapp* v. *Ohio,* 367 U.S. 643 (1961) (determining that exclusionary rule should apply to States) *Baldwin* v. *New York,* 399 U.S. 66 (1970) (determining what is a petty offense for jury trial purposes); *Scott* v. *Williams,* ... U.S. ..., 59 L.Ed.2d 383 (1979) (determining an indigent defendant's right to appointed counsel).

tional contours of the accused Sixth Amendment right to trial by jury. In *Duncan* v. *Louisiana,* 391 U.S. 145 (1967), the Court applied the Sixth Amendment guarantee of trial by jury to the states through the Fourteenth Amendment. In *Williams* v. *Florida,* 399 U.S. 78 (1970) the Court refused to hold unconstitutional laws of various states allowing juries of less than twelve persons. The Court noted that the holding in *Williams* did "no more than leave these considerations to Congress and the states, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." *Id.*, at 103.

Following similar reasoning in *Apodaca* v. *Oregon,* 406 U.S. 404 (1972) the Court found that the Constitution does not require jury verdicts to be unanimous. Of particular interest here is Mr. Justice Powell's concurrence in *Apodaca:*

> "In an age in which empirical study is increasingly relied upon as a foundation for decision-making, one of the more obvious merits of our federal system is the opportunity it affords each state, if its people so choose, to become a 'laboratory' and to experiment with a range of trial and procedural alternatives. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists concerning the adequacy of our criminal justice system. The same diversity of local legislative responsiveness that marked the development of economic and social reforms in this county, if not barred by an unduly restrictive application of the Due Process Clause, might well lead to valuable innovations with respect to determining—fairly and more expeditiously—the guilt or innocence of the accused." *Id.* at 376.

Most recently, in *Burch* v. *Louisiana,* 441 U.S. 130 (1979), which establishes the Constitutional requirement of unanimous verdicts by six member juries, the Court found the experience of the states instructive:

> "It appears that from those states that utilize six member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts. We think that this near-uniform *judgment of the nation* provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." [9] *Id.* at 104 n. 8. (Emphasis added.)

Thus, the present void of experience of the States in dealing with trial closure motions counsels strongly against granting certiorari for the purpose of fashioning new constitutional rules of access to criminal trials.[10]

The uncertain parameters and consequences of the novel

[9] Between the Court's decision in *Williams* and *Burch* it appears that ten states adopted provisions to allow for juries of six men in some criminal trials. And it was this trend of the States to decrease the size of the jury following *Williams* which the Supreme Court relied upon as its constitutional guide. *Compare Williams* v. *Florida, supra,* at 138 (Harlan, J., dissenting) (appendix) and *Burch* v. *Louisiana, supra,* at 138 n. 12.

[10] Appellees suggest *only* that the Court refrain from a decision at this time until the effects of *Gannett,* if any, are seen and other courts and the state legislatures have had an opportunity to react and the "judgment of the nation" is recorded. In this context it should be pointed out that before the appellants noted their instant appeal to this Court, the Virginia Attorney General's Office commenced drafting a proposed Virginia Public Trial Act to be introduced in the January 1980 session of the Virginia General Assembly, which proposals detail the procedures and standards for entry of a closure order at any stage of a criminal trial. These efforts were pursued at a time when a lawyer for the Appellants was quoted in a Norfolk, Virginia newspaper as stating that "the State Supreme Court's denial . . . was not unexpected in the wake of the *Gannett* decision" and that "[a]n appeal is not expected." *The Virginian-Pilot,* July 12, 1979, at A8, col. 6.

constitutional rights Appellants assert further suggests the wisdom of avoiding a rush to constitutional adjudication in this case. The questions that arise naturally from recognition of the asserted rights of the public to attend trials are unending. For example, if notice of requested closure is required this may well increase the publicity concerning the trial, the prejudice of which the accused is seeking protection by closure. Even if standing to object to closure is limited to those present at the time the closure motion is made, the extent and nature of the hearing necessary to protect this right fully is unclear. Must the court hear each individual spectator who objects? Must the court afford persons who object an opportunity to be represented by counsel? What evidence, if any, may objecting spectators present and who has the ultimate burden of proof? What appeal rights are available to persons whose objections to closure are not sustained?

If the public is severely limited in its ability to object, then perhaps a heavier burden is placed on the accused to sustain his initial motion to close a trial. Too great a burden upon an accused, especially indigent defendants, may well preclude most defendants from success in seeking closure, thereby increasing possibilities of prejudice to the accused's right to a fair trial and providing an additional basis for appeal.

If objecting spectators and members of the press are afforded a relatively liberal opportunity to state their objections with the assistance of counsel and the introduction of evidence, such an expanded hearing may well cause trial delays adversely affecting the accused's right to a speedy trial. Appeals from rulings on closure motions, if interlocutory, will only further magnify trial delay. Criminal defendants with limited resources may frequently find

themselves at a substantial disadvantage when a motion for closure is opposed by the resources of the institutional press.

Appellants seek recognition of a constitutional right of access to a public forum. Legislative attempts at establishing rights of public access such as the Federal Freedom of Information Act and the Virginia Freedom of Information Act, have not easily defined and adjusted public access rights. Both federal and state courts are deeply involved in continued re-definition of such statutory public access rights. Much legislative re-drafting has been necessary, and the administration of these rights continues to be a major effort.[11]

It is also difficult at this stage to forecast with any degree of certainty the standard which will be appropriate to determine when the risk to an accused's right to a fair trial is sufficient to overcome this newly declared right of access. The appellants suggest an "all-but-conclusive presumption" in favor of a public trial. The dissent in *Gannett* suggests

[11] Virginia's Freedom of Information Act came into being in 1968. Since then the legislature in reviewing its administration has amended it annually with the exception of 1969 and 1972. Some 20 bills have been enacted amending this Act and numerous others have been introduced but defeated. The Attorney General of Virginia has issued some 122 official opinions interpreting its provisions. Though there is no complete record of lower court decisions under the Act, the Supreme Court of Virginia has taken and decided two appeals involving its provisions. *See* Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (1950), as amended; Annual Report of the Attorney General, 1968-1969 through 1978-1979; *Archer* v. *Mayes,* 213 Va. 633, 194 S.E.2d 707 (1973); and *WTAR Radio-TV Corp.* v. *City Council,* 216 Va. 892, 223 S.E.2d 895 (1976). Such a history is indicative of not only the difficulty inherent in the establishment of rights of access but also the need for flexibility in their administration. The federal statute has given rise to similar problems. This Court has recognized that it is not an easy task to balance the opposing interests and provide a workable formula which encompasses, balances and protects all interests. *Administrator, Federal Aviation Administration* v. *Robertson,* 422 U.S. 255, 261-262 (1975).

that the accused show a "substantial probability that irreparable damage to his fair trial will result." 99 S.Ct. at 2937. Mr. Justice Powell's concurring opinion in *Gannett* calls for the defendant "to make some showing that the fairness of his trial likely will be prejudiced by public access to the proceedings." 99 S.Ct. at 2916. Without some experience with trial closure orders, a constitutional standard appropriate to all concerns cannot be meaningfully developed. For these reasons, this Court should not grant certiorari in this case.

II.

THE FIRST AMENDMENT DOES NOT AFFORD THE PUBLIC OR PRESS A RIGHT TO ATTEND CRIMINAL TRIALS

A.

The First Amendment Protects Dissemination Of Ideas And Information

The First Amendment has been viewed by this Court as a guarantee of freedom to discuss and publish ideas and information concerning public affairs and governmental operations. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978); *New York Times, Co.* v. *United States,* 403 U.S. 713 (1971); *Mills* v. *Alabama,* 384 U.S 124 (1966); *New York Times, Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Near* v. *Minnesota, ex. rel Olson,* 283 U.S. 697 (1931). The common thread of this Court's First Amendment decisions is the notion that freedom to *disseminate* ideas and information about public affairs is central to the purpose of the First Amendment.

First Amendment guarantees extend to dissemination of ideas and information concerning our courts and the administration of the judicial system. *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829 (1977); *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975); *Wood* v. *Georgia,* 370 U.S. 375 (1962); *Bridges* v. *California,* 314 U.S. 252 (1941).

These First Amendment rights to speak and publish concerning courtroom events, as in other contexts, are not absolute. Where utterances concerning court proceedings present a clear and present danger to the fair administration of justice such utterances may be punished. *Bridges* v. *California, supra; Wood* v. *Georgic, supra; see also Craig* v. *Harney,* 331 U.S. 367 (1947); *Pennekemp* v. *Florida,* 328 U.S. 331 (1946). Fair trial considerations impose upon our courts the constitutional duty to prevent bias against the criminally accused threatened by unrestrained press access to the courtroom. *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Estes* v. *Texas,* 381 U.S. 532 (1965). Thus, to the extent that courtroom access has been considered by this Court in prior decisions, access has never been viewed as a matter of constitutional right. Instead, access and the manner of reporting courtroom events has been perceived as an interest of the public and press subject to limitation by the paramount concern for the right of the accused to a fair trial. *Sheppard, Estes, supra.*

B.

The Appellants Do Not Assert Infringement Of Any Established First Amendment Right They Seek Establishment Of A New Right Of Access Which Has Never Been Recognized By This Court

This case does not call in question the established First Amendment rights to speak, publish or receive information. Instead, the Appellants urge the establishment of an

entirely new right of *access* to criminal trials. *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898, 2910-2912 (1979). This right of access is said to arise from the public need for the free flow of information about its governmental institutions as a necessary feature in a system of self-government. Brief of Appellant, 27-30.

1.

THE PUBLIC HAS NO EXISTING RIGHT OF ACCESS TO CRIMINAL TRIALS

The free flow of information concerning our courts of justice is undoubtedly a vital concern in our system of democratic self-government. Accordingly, the right of the public and press to freely discuss and publish information obtained concerning what transpires in our courts has been repeatedly safeguarded. *Bridges* v. *California; Landmark Communications, Inc.* v. *Virginia; Cox Broadcasting Corp.* v. *Cohn, supra.* But it is a wholly different proposition to suggest that the First Amendment guarantees access to all sources of information that may be beneficial to informed public opinion. First Amendment claims of access rights have been consistently rejected by this Court. *Houchins* v. *KQED, Inc.,* 438 U.S. 1 (1978); *Pell* v. *Procunier,* 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974); *Zemel* v. *Rusk,* 381 U.S. 1 (1965).

In *Zemel* the Court recognized the virtually limitless reaches of the First Amendment argument Appellants assert here, for "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." 381 U.S. 1, at 16-17. Thus, it was unequivocally held that "the right to speak and publish does not carry with it the unrestrained right to gather information." 381 U.S. 1, at 17. The Appellants' claim of a right

of the public to attend criminal trials under the First Amendment is similarly meritless. *Zemel, supra.*

2.

THE PRESS HAS NO FIRST AMENDMENT RIGHT OF ACCESS TO CRIMINAL TRIALS WHICH IS GREATER THAN THAT OF THE PUBLIC

The Appellants argue that even absent a public right of access to criminal trials, the press has such a First Amendment right, contending that the Constitution protects "news gathering." Relying upon dicta found in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), it is suggested that the First Amendment affords at least "some protection for seeking out the news," out of which arises the right of the press to attend criminal trials. But neither *Branzburg* nor any other decision of this Court implies any First Amendment right of the press to gain access to news sources. To the contrary, *Branzburg* held that the paramount societal interest in effective administration of justice required that news reporters appear before grand juries and reveal the identity of confidential news sources suspected of criminal activity notwithstanding the fact that such grand jury testimony may diminish future access to confidential news sources. Thus, *Branzburg* can hardly be relied upon for the proposition that the First Amendment guarantees press access to news sources. Mr. Justice Stewart, writing for the Court in *Pell* v. *Procunier, supra,* explained the extent of any First Amendment protection of news gathering stating:

> "It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, cf. Branzburg v. Hayes, supra, and that government cannot restrain the publication of news ema-

> nating from such sources. Cf. New York Times Co. v. United States, supra. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court." 417 U.S. 817, at 834-835.

The First Amendment does not, therefore, guarantee the press a right of access to news sources. *Branzburg, Pell, supra.*

Recognition of a constitutional right of the press to gather news would necessarily require a definition of the term "press." The practical problems involved in applying such a right are at once evident. If, as appellants contend, this special right of the press emanates from its function of informing the public, would not the right to gather news belong only to the large institutional press? But recognition of a right of this nature is inconsistent with the historical context of the First Amendment which this Court has found was designed to protect the "lonely pamphleteer" as well as the large newspaper publisher. *Branzburg, supra,* at 704. Moreover, there is no requirement that the press publish information gained through this asserted right of access. *Houchins, supra,* at 14. The public's interest in self-government, therefore, is not necessarily advanced by recognition of such a special right of access for the press. There is, accordingly, no discernable basis for recognition of a constitutional right of access to news sources which the press asserts here. Indeed, the decisions of this Court have repeatedly rejected any suggestion that the First Amendment affords special rights to the press. *Branzburg, Pell, Saxbe, Houchins, supra.*

C.

The Fact That Criminal Trials Have Customarily Been Open To The Public And Press Does Not Establish A Constitutional Right Of Access

Our custom of public criminal trials is well-established. *In re Oliver,* 333 U.S. 257 (1948). But the explicit constitutional right of the accused under the Sixth Amendment to demand a public trial must account, in large part, for the custom of public trials. In any event, the fact that exclusion of the public and press from criminal trials is customarily rare does not establish for the benefit of the public and press a constitutional right to require public trials. *See Gannett, supra,* at 2910 n. 19.

The Appellants suggest that the traditionally public character of our courtrooms supports recognition of a First Amendment right of access. They contend that because courts are customarily viewed as public places there is greater reason for recognizing a First Amendment right of access to criminal trials than might obtain in situations where rights of access to places not usually public have been advanced. *Cf. Pell, Saxbe, Houchins.* But this Court's refusal to recognize a First Amendment right of access to places traditionally closed to public view in *Pell, Saxbe* and *Houchens,* suggests that there is even less reason to recognize a right of access to customarily public places. If, as the Appellants contend, the First Amendment right of access is premised upon the public's need for information concerning the operations of government, then a stronger case for public rights of access is made with respect to governmental operations in places where public access is customarily limited. Our tradition of public trials and the right of the accused to require a public trial are factors which militate against any need for recognition of a new constitutional right of access to criminal trials.

D.

The Function Of A Criminal Trial Does Not Imply A Right Of Public Access

Criminal trials "are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Estes* v. *Texas, supra,* at 540. The "atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." *Id.* The chief function of a criminal trial is, therefore, to fairly adjudicate the charges against the accused. It goes without saying that a fair trial is the paramount concern of the accused and is, indeed, his right. Society's interest in observing the trial process is to ensure that our criminal justice system does not become a means of governmental persecution. *In re Oliver, supra,* at 270. Thus, the main societal function and interest in criminal trials coincides with the interests of the accused. The accused does not, of course, have the unilateral right to require trial closure. *Singer* v. *United States,* 380 U.S. 24 (1965). Our adversary system of criminal justice is premised on the duty of the prosecutor and judge to represent the public's interest in criminal trials. *Berger* v. *United States,* 295 U.S. 78 (1935); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966). But where the accused, prosecutor and judge all deem trial closure necessary to ensure a fair trial closure cannot be said to subvert the function of the criminal justice system or the interests of the public in the operations of that system.

Appellants apparently dismiss these premises which are the very foundations of our criminal justice system. They suggest that absent a constitutional right of the press and public to demand access to criminal trials closed trials may become the rule for the mere convenience of prosecutors

and judges. This argument ignores our historical experience and proves too much. If prosecutors and judges are deemed inherently incapable and unwilling to protect societal interest in the criminal justice system then our entire criminal justice system requires constitutional re-examination. *See* Part III, *infra* at pp. 36-37.

The Appellants maintain that only through recognition of a right of public access to criminal trials can the vital functions of a trial be accomplished. Their contention is that the vital function of a criminal trial is informational, providing a "social drama" through which the community at large can inform itself about and experience criminal justice. Appellant's Brief, 33-34. The public undoubtedly gains knowledge of the criminal justice system through observing its operation, but experience shows that the average citizen infrequently takes advantage of this informational opportunity. *Saxbe, supra* at 863 (Powell, J., dissenting). To the extent that criminal trials serve this informational function, our tradition of public trials in the vast majority of cases will continue to serve this societal need.

The fair adjudication of the accused, however, must remain the central focus and primary function of our criminal justice system. *Estes, supra,* at 540. The abstract right to know cannot be said to occupy the position of central importance when assessing the functions of the criminal justice system. The overriding importance of the constitutional guarantee of a fair trial, in some circumstances, has required limitations on public and press access to the courtroom. *Sheppard, supra,* at 358. Thus, the most vital and paramount function of the criminal trial in our society does

not require that the public have a First Amendment right of access to all criminal trials.[12]

III.

THE SIXTH AMENDMENT EMBODIES NO PUBLIC RIGHT OF ACCESS TO CRIMINAL TRIALS

In *Gannett Co. Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979), this Court stated that the Sixth Amendment's public trial guarantee does not give the public a right of access to criminal proceedings: "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Id.* at 2911.

A.

The Sixth Amendment Guarantee Of The Right To A Public Trial Is Personal To The Accused

1.

By Its Literal Terms The Sixth Amendment Secures The Right To A Public Trial Only To The Accused

In finding that the Constitution nowhere mentions any right of public access to a criminal trial, the *Gannett* majority stated that the constitutional guarantee of a public trial is "one created for the benefit of the defendant." *Id.* at 2905. In essence, the majority concluded that the Sixth Amendment means precisely what it says, that is that "the

[12] The Appellants suggest, for example, that closure forecloses the opportunity of the public to judge credibility of witnesses, noting that the availability of a post-trial transcript is unsatisfactory. (Brief of Appellant at 40-43). This presumes that the public's judgment of trial testimony is a vital function of a criminal proceeding. Obviously, only the trier of fact must judge the credibility of witnesses in order to ensure the proper function of a trial. Even appellate courts, which have an institutional function in the criminal justice system, do not have the advantage of live testimony.

accused shall enjoy" a right to public trial.[13] This literal reading is consistent with the over-all design of the Sixth Amendment, which has as its overriding purpose the protection of the accused from judicial and prosecutorial abuses. *Id.* at 2905-06. This conception of the public trial guarantee finds consistent support in the decisions of this Court and various lower federal and state courts.[14] It also finds support in numerous commentaries.[15]

2.

Existence Of A Common Law Rule Of Open Civil And Criminal Proceedings Does Not Establish A Sixth Amendment Right In The Public To Attend A Criminal Trial

While a majority of this Court in *Gannett* recognized the existence of a common law tradition of open civil and criminal proceedings, they found no evidence that the framers of the Sixth Amendment intended to create a constitutional right of access in the public. 99 S.Ct. at 2908. Thus, the court refused to ascribe constitutional dimension

[13] The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. Const., Amendment VI.

[14] *See, e.g., Estes* v. *Texas,* 381 U.S. 532, 538-39, 583 (1965); *In Re Oliver,* 333 U.S. 257, 270 (1948); *Patton* v. *United States,* 281 U.S. 276, 298 (1930); *United States* v. *Geise,* 265 F.2d 659, 660 (9th Cir. 1959) (per curiam); *United States* v. *Sorrentino,* 175 F.2d 721, 722-23 (3rd Cir. 1949); *United Press Ass'n* v. *Valenti,* 308 N.Y. 71, 81, 123 N.E.2d 777, 781 (1954). Only one court is known to have held that the Sixth and Fourteenth Amendments confer upon members of the public a right of access to a criminal trial. *United States* v. *Cianfrani,* 573 F.2d 835 (3rd Cir. 1978). That holding, however, has been criticized for its departure from the plain meaning of the Sixth Amendment. *See, Gannett, supra,* at 2906 n. 9.

[15] *See* commentaries summarized in *Gannett,* 99 S.Ct. at 2906 n. 9; Douglas, *The Public Trial and the Free Press,* 33 Rocky Mt. L. Rev. 1, 5 (1960).

to the common law tradition. Indeed, the majority notes that in "conspicuous contrast with some of the early state constitutions that provided for a public right to open civil and criminal trials, the Sixth Amendment confers the right to a public trial only upon a defendant and only in a criminal case." *Id.* at 2908-09. The refusal to raise custom and tradition to the level constitutional mandate is entirely consistent with the fact that historically very few common law rules have been elevated to the status of constitutional rights. *Id.* at 2908.

Had the framers intended to elevate and embody within the Constitution the common law tradition of open proceedings, it is not logical to assume that the only reference to a public trial would be found in the Sixth Amendment, which by its terms speaks only of the accused in a criminal case. Moreover, were this Court to ignore the clear text and structure of the Constitution to find within the Sixth Amendment a public right of access to criminal trials, innumerable unanswered questions would arise concerning the scope of such a right within the trial process. *See* I, *infra*, pp. 18-21.

B.

The Right To A Fair Trial Must Not Be Denied

1.

THE ACCUSED'S RIGHT TO A FAIR TRIAL IS PARAMOUNT TO ANY SOCIETAL INTEREST IN A PUBLIC TRIAL

In any criminal proceeding, the ultimate concern is for protection of the accused's right to a fair trial.[16] This Court has referred to this right as "unquestionably one of the most

[16] In *The Right To A Fair Trial*, Mr. Justice Powell, then President of the American Bar Association, recognized this concern, noting that:

> [W]e must avoid being confused by generalizations and slogans . . . some persons have talked about "a public right to know" as if it were a constitutional right. These generalizations miss the point. . . . We must bear in mind that the primary purpose of a public trial and of the media's right as a part of the public to attend and report what occurs there is to protect the accused. . . . The ultimate public concern is not the satisfaction of curiousity or an abstract "right to know." Rather it is the assurance that trials are in fact fair and according to law.

Powell, *The Right To A Fair Trial*, 51 ABAJ 534, 538 (1965).

precious and sacred safeguards enshrined in the Bill of Rights," *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 572 (1976) (Brennan, J., concurring), and in fact has characterized it as "the most fundamental of all freedoms." *Estes* v. *Texas*, 381 U.S. 532, 540 (1965). Although the press should normally be allowed the opportunity to observe judicial proceedings, "its exercise must be subject to the maintenance of *absolute fairness* in the judicial process." *Id.* at 539 (emphasis added). "[T]he life or liberty of any individual in this land should not be put in jeopardy because of the actions of any news media. . . ." *Id.* at 540. Accordingly, "the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged." *Sheppard* v. *Maxwell*, 384 U.S. 333, 358 (1966). Indeed, this Court has made clear that "our system of law has always endeavored to prevent even the probability of unfairness." *In Re Murchison*, 349 U.S. 133, 136 (1955).

Appellees fully realize, as did the majority in *Gannett*, that there is a strong societal interest in public trials and in the vast majority of cases, trials have in fact been open. As noted, however, the societal interest in public trials must yield whenever necessary to maintain "absolute fairness." To ensure such fairness, this Court placed an affirmative obligation on trial judges to protect the rights of the ac-

cused. *Sheppard* v. *Maxwell, supra.*[17] In fulfilling this obligation, a trial judge must exercise broad discretion, which should not be disturbed absent a clear showing of abuse. *See Nebraska Press Ass'n* v. *Stuart, supra,* at 563. *Cf. Ehrlichman* v. *Sirica,* 419 U.S. 1310 (1974). Indeed, this Court recognized in *Gannett* that "our criminal justice system permits, and even encourages, trial judges to be overcautious in ensuring that a defendant will receive a fair trial." 99 S.Ct. at 2905 n. 6. Moreover, it was stated that "a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." *Id.* at 2904. It would be the height of irony if the public was permitted to use the accused's constitutional right to a public trial, his personal "safeguard against any attempt to employ our courts as instruments of persecution,"[18] to nullify his constitutional guarantee of a fair trial.[19] As one court concluded in rejecting a media claim for a right of access to criminal trials, "petitioners are seeking to convert what is essentially

[17] Specifically, the Court stated:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure the balance is never weighed against the accused. 384 U.S. at 362.

[18] *In Re Oliver,* 333 U.S. 257, 270 (1948).

[19] Appellees submit that in this case the Virginia trial judge exercised his discretion to close the trial in good faith, out of legitimate concern that an open proceeding would infringe the defendant's right to fair trial. Judge Taylor interrupted the trial, however, to allow counsel for Appellants to present written and oral arguments to the court challenging the closure order. (App. 7a-20a). Judge Taylor concluded that an open proceeding would infringe the defendant's right to a fair trial and he was of the view that "where the rights of the defendant are infringed in any way . . . [and] he makes the motion . . . and . . . it doesn't completely override the rights of everyone else, then I'm inclined to go along with the defendant's motion." (App. 17a). Accordingly, Judge Taylor adhered to his closure order. (App. 21a).

the right of a particular accused into a privilege for every citizen, a privilege which the latter may invoke independently of, and even in hostility to, the rights of the accused. A moment's reflection is enough . . . to demonstrate that that cannot be. . . ." *United Press Ass'n* v. *Valente,* 308 N.Y. 71, 81, 123 N.E.2d 777, 781 (1954).

2.

RECOGNITION OF A SOCIETAL INTEREST IN PUBLIC TRIALS CREATES NO CONSTITUTIONAL RIGHT ON THE PART OF THE PUBLIC AND SOCIETY'S INTEREST IS FULLY PROTECTED BY THE PARTICIPANTS

The public, which includes the press, has important interests in the trial of a person charged with a crime, not the least of which is the interest of securing for an accused a fair trial. *See In Re Oliver,* 333 U.S. 257 (1948). In *Gannett,* however, this Court found that any recognition of an independent public interest in the enforcement of Sixth Amendment guarantees was a "far cry . . . from the creation of a constitutional right on the part of the public." 99 S.Ct. at 2907. After concluding that interest alone does not create a constitutional right, the Court found that there was no basis for inferring a Sixth Amendment right on the part of the public to attend criminal trials, since "[i]n an adversary system of criminal justice, the public interest . . . is protected by the participants in the litigation." *Id.* Like the public interest in speedy trials and trial by jury, any independent public interest in public proceedings is adequately protected by the parties and the trial judge. *Id.* Where a defendant waives his right to a jury trial, and the prosecutor and the judge consent, for example, "it could hardly be seriously argued that a member of the public could demand a jury trial because of the societal interest

in that mode of fact-finding."[20] *Id.* Nor can it be seriously argued that a member of the general public has any "right to prevent a continuance in order to vindicate the public interest in the efficient administration of justice." *Id.* at 2908. In short, "[t]he public's interest is adequately safeguarded as long as the accused himself is given the opportunity to assert on his own behalf, in an available judicial forum, his right to a trial that is fair and public." *United Press Ass'n* v. *Valente, supra* at 81, 123 N.E.2d at 781.[21]

Appellants argue, however, that the public's interest is not adequately protected by the participants in the litiga-

[20] Inasmuch as the public trial clause is personal to the accused, with the overriding purpose of protecting the accused's right to a fair trial, the public lacks sufficient standing to challenge a trial closure. Any media interest is of a general nature shared by the public at large. Such an interest provides an inadequate personal stake in the outcome of the controversy for Art. III purposes. A sufficiently concrete interest in the outcome of a suit is necessary, however, to qualify as a case or controversy subject to a federal court's Art. III jurisdiction. *See Singleton* v. *Wulff,* 428 U.S. 106, 112 (1976). Moreover, to satisfy this Court's prudential standing limitations, parties must be "proper proponents of the particular legal rights" on which they base their challenge, *id.*, that is they must be within the "zone of interests intended to be protected by the constitutional . . . provision" on which they rely. *Id.* at 123 n. 2. (Powell, J., joined by Burger, Stewart and Rehnquist, JJ., concurring in part and dissenting in part.) The Sixth Amendment, however, secures the right to a public trial only to the accused and members of the public therefore are not proper proponents of this right. This is especially true where, as here, the trial closing was requested by the accused and consented to by the prosecution.

[21] By the very nature of things, the accused's defense is more than likely to be adequate. As the court in *Valente* further stated:

> Whatever concern the public may have for a defendant's right to a fair trial, it can seldom match that of the person whose life or liberty is at stake. . . . As long as the defendant is assured the right to invoke the guarantees provided for his protection, the public interest is safe and secure, and there is neither need nor reason for outsiders to interject themselves into the conduct of the trial.

308 N.Y. at 81, 123 N.E.2d at 781.

tion. They speculate, for example, that occasional closed hearings may foster corrupt bargains among prosecutors, judges and defendants. Outside of an absolute ban on private proceedings, however, no procedure could entirely foreclose that possibility. Appellants' argument calls into question the integrity of the entire judicial process, which is seldom, if ever, conducted completely in public. Rules of procedure governing countless routine trials were not designed or intended to entirely foreclose the possibility of a judicial mistake.[22] The workability of our system depends on the assumption that competent honest persons will occupy the positions of judge and prosecutor. Indeed, this Court has recognized that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. . . ." *Berger* v. *United States,* 295 U.S. 78, 88 (1935). "This responsibility of the prosecutor . . surely encompasses a duty to protect the societal interest in an open trial," *Gannett, supra,* at 2908 n. 12. In fact, most of the interests preserved by open trials are concurrent with the interest of the prosecutor or the defendant and can be asserted by them. Both have a stake in the quality of testimony, the discovery of unknown witnesses, and the conscientious performance of official duties by trial participants. In the hypothetical case, where the defendant, prosecutor and judge conspire to subvert the public interest, it is doubtful that public observation would provide much safeguard, since such a conspiracy would in all likelihood be consummated in private discussions, even if the formal proceedings were public.

Finally, the contentions that public trials restrain perjury

[22] *See* Mr. Justice Stevens, Address at the University of Arizona College of Law Dedication Ceremony, September 8, 1979.

and are needed to bring forward new witnesses "seem anachronistic," particularly in the modern publicity case, "when many facts of the prosecution are widely broadcast regardless of whether the hearing is open or closed. Taken together, the arguments seem more the stuff of appealing courtroom drama than substantial principles of modern law."[23] Similar observations have been made with respect to other public interests purportedly advanced by open trials.[24]

3.

ANY GENERAL PUBLIC INTEREST IN LIMITING THE USE OF TRIAL CLOSURES CAN BE PROTECTED BY THE POLITICAL PROCESS

A trial judge has the inherent power and the obligation to close or restrict public access to the courtroom to protect the rights of the parties and witnesses and generally to further the fair administration of justice. *See Gannett, supra* at 2910 n. 19; *Sheppard* v. *Maxwell, supra* at 358. To be sure, closure orders should be sparingly employed and should not be granted routinely or simply because the accused so moves. While in many instances less restrictive measures may be employed, at times closure will be the

[23] *See* Madsen, S., *The Right To Attend Criminal Hearings,* 78 Columbia L. Rev. 1308, 1323 n. 118 (1978).

[24] For example, the contention that public scrutiny improves the performance of trial participants is weak. "Such scrutiny, when intense, may actually impair performance by inducing a debilitating self-consciousness." *Id.* 78 Columbia L. Rev. at 1323 n. 118. Moreover, one commentator has noted that the presence of a crowd in the courtroom has been more often a stimulus to improper judicial conduct than a check upon it. *See* Radin, *The Right To A Public Trial,* 6 Temp. L. Q. 381, 394 (1932). Finally, this was the fourth trial of Stevenson and there is nothing to suggest that any of the interests preserved by open trials were jeopardized by closure of this trial.

only effective remedy to protect constitutional rights of a criminal defendant or the public interest in the fair and orderly disposition of criminal proceedings. In many cases, "[c]ontinuance, extensive voir dire examinations, limiting instructions or venue changes may prove paltry protection for precious rights" and "[r]eversals and new trials are hardly acceptable alternatives." *Gannett Co., Inc.* v. *DePasquale,* 43 N.Y.2d 370, 380, 372 N.E.2d 544, 550 (1977).[25] Each case must be determined on the basis of its unique facts and circumstances. The considered opinion of the court, the prosecutor and defense counsel that closure is necessary should not lightly be disregarded. *Cf. Singer* v. *United States,* 380 U.S. 24, 34-35 (1965). Having imposed upon the trial judge the affirmative obligation to protect the rights of the accused,[26] it would surely be inconsistent to withhold the discretionary power necessary to accomplish the task.

It is possible, of course, for some judges to abuse their discretion and occasionally enter unwarranted closure orders. While this may be an important consideration for state legislatures to weigh in establishing and revising state law and policy, it is not an acceptable justification for creation of new constitutional rights.

[25] Specifically, continuance has been found in some instances to work against speedy trial values. *See Groppi* v. *Wisconsin,* 400 U.S. 505, 510 (1971). Moreover, extensive voir dire can prove costly, time-consuming and ultimately futile. *See Irvin* v. *Dowd,* 366 U.S. 717, 726-29 (1961). In addition, change of venue may prove useless if the new location has been saturated with adverse publicity. *See Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 545 (1976); Madsen, S., *The Right to Attend Criminal Hearings,* 78 Colum. L. Rev. 1308, 1329 n. 152. Finally, instructions and sequestration may be of limited value in offsetting the effects of prejudicial publicity.

[26] *Sheppard* v. *Maxwell, supra* at 352-63; *Irvin* v. *Dowd,* 366 U.S. 717 (1961).

IV.

THE FIRST AND SIXTH AMENDMENTS, WHEN TAKEN IN CONJUNCTION, DO NOT SUPPORT A PUBLIC RIGHT OF ACCESS TO CRIMINAL TRIALS

Neither the First nor the Sixth Amendment alone provides a basis for a public right of access to criminal trials.[27] Nor do these Amendments taken together support such a right.

Admittedly this Court has found that in special circumstances separate constitutional rights may converge to establish a new right not specifically enumerated. In most such instances, however, the previously recognized converging rights have significantly reinforced each other, have promoted related purposes, and have conferred their benefits upon the same person or persons. Moreover, the newly established right was, in these cases, found necessary to achieve the core purposes of the existing rights.

In *Boyd* v. *United States,* 116 U.S. 616 (1886), for example, the Fourth and Fifth Amendments were found to converge and reinforce each other to protect an individual's security and privacy against a statute authorizing compulsory production of personal records for use as evidence against the individual. The Court had recognized that neither amendment on its own was sufficient to invalidate the statute.

Similarly, in *NAACP* v. *Alabama,* 357 U.S. 449 (1958), this Court found a right of association in the "close nexus between the freedoms of speech and assembly," protected by separate clauses of the First Amendment. *Id.* at 460. Recognition of this right of association was found to clearly promote the fundamental purposes of each clause, while a failure to recognize the activity as protected would have

[27] *See* Parts II and III *supra.*

frustrated those purposes. Similar analysis has been applied in other cases.[28]

In sharp contrast to the above-mentioned cases, the Sixth Amendment right of a public trial is personal to the accused and is designed to guarantee the accused a fair trial. The concern of the First Amendment, however, is the right of the press and public to disseminate information, which in many instances may conflict with rather than reinforce the purpose of the Sixth Amendment. Where such conflict occurs, the First and Sixth Amendment rights can hardly be said to be interdependent. Because of the potential conflict between these two Amendments and given their divergent core purposes, there is no basis for finding any public right of access from the separate existence of the Amendments.[29]

V.

THE COURT BELOW GAVE ALL APPROPRIATE DEFERENCE TO ANY CONSTITUTIONAL RIGHT OF ACCESS IN ITS DECISION TO CLOSE THE TRIAL

Assuming, *arguendo,* that there is a constitutional right of access to criminal trials which runs to the public and the press, the trial court, in the instant case, gave all appropriate

[28] *See e.g., Griswald* v. *Connecticut,* 381 U.S. 479 (1965); *United States* v. *United States District Court,* 407 U.S. 297, 313-14 (1972).

[29] Similarly, there is no merit to Appellant's argument that a right of access is implicit in the Anglo-American regime of ordered liberty and is among the rights or privileges "retained by the people." (*See* Appellant's Brief at IID). In support of this argument, Appellant simply reargues his notion that common practice and tradition establish a right of access as a fundamental right. This argument, however, has been rejected in *Gannett.* 99 S.Ct. at 2907-09. Moreover, the tradition of open trials is in large part explained by the explicit right of an accused to a public trial in a criminal case. Accordingly, this tradition should not be the basis for creation of new rights which may be hostile to the rights of the accused to a fair trial.

deference to any right of access in its decision to close the trial. The closure motion of defense counsel was based upon prior difficulties in controlling a spectator who had apparently transmitted information to witnesses. Upon motion by the accused and without objection from the Commonwealth's Attorney or from any spectator, including Appellants, the trial court ordered that the trial be closed to the public and press. (App. at 5a-6a). Despite the Appellants' failure to object at the time of closure, they were granted a hearing after the first day of the trial at which they presented written and oral argument challenging closure. (App. at 7a-20a). The trial court assumed that the public and the press had a protected constitutional interest but reasoned that there must be a balancing of that interest against the defendant's right to a fair trial (App. at 12a-13a), an "evaluation" which counsel for appellants agreed was appropriate. (App. at 13a). The trial court ruled that "where the rights of the defendant are infringed in any way . . . [and] he makes the motion. . . and it doesn't completely override the rights of everyone else, then I am inclined to go along with the defendant's motion." (App. at 17a). Accordingly, the closure order was continued.

This Court approved similar procedural steps in *Gannett* v. *DePasquale, supra,* at 2912. Though Appellants urge that more stringent procedures are required, they further maintain that the ruling of the trial court was defective because there was "virtually nothing to support" closure. (Brief of Appellant at 69). The record, however, discloses several important factors which weighed in favor of protecting the right of the accused to a fair trial through closure. Appellants, on the other hand, offered no evidence to support the viability of reopening the trial.

As indicated previously, the closure motion was first

premised upon a prior trial of the same defendant in which there was difficulty involving conversations between witnesses and a spectator.[30] The trial court was also aware and reminded that one of the previous mistrials was caused by a prospective juror who related prejudicial newspaper accounts to other jurors. The record further indicates that the venire was a small community where jurors would be more likely to be aware of and affected by any hostility towards the defendant within the community evidenced within the courtroom. The trial court also took note of the layout of its facilities. Although this factor may have little importance in the average case, this was not the average case in the Circuit Court of Hanover County. A previous guilty verdict had been overturned and two previous attempts at retrial had ended in mistrials.[31] Thus, avoidance of a third mistrial was a legitimate concern and enhanced

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[30] The record upon appeal does not articulate with precision every factor which the trial court may have considered in ordering the closure of the trial. However, this Court must recognize that the closure motion was made on the fourth attempt to try this defendant and that the judge, prosecutor and defense counsel were fully aware of the difficulties and problems which had arisen in the prior proceedings, as were appellants. (App. at 24a-39a). Though appellants characterize the references in the record as being "nebulous and unsupported" (Brief of Appellants at 67), the obvious explanation is that such references were more than clear to the parties to the prior proceedings and required no further detail. That they are clearer to Appellants than they admit is apparent from the record in this appeal which is amplified by appellants own news articles. (App. 29a, 34a, 35a, and 37a).

[31] The Court's reference to the layout of the courtroom evidenced more than a desire to prevent the jury from seeing the spectators. Though all of the Court's concerns may not have been articulated, appellants courtroom sketch, Exhibit A, shows that whenever the jury goes to the jury room they must necessarily pass through the spectator gallery. Furthermore, because the doorways to the jury room lead to the gallery and the public arcade, it is to be expected that even the inadvertant comments of spectators, let alone those calculated to prejudice the accused, would be heard by the jurors.

the need to assure that prior difficulties would not be repeated. *Estes; Sheppard, supra.* Appellants offered no contradictory evidence supporting an open proceeding but suggested that alternatives to closure of the trial would adequately protect the defendant's right to a fair trial. Sequestering the jury and change of venue, the only alternatives specifically mentioned, were not viable under the circumstances. Sequestration was, at the time of the hearing on closure, moot because the jury had been dismissed for the day. A change of venue was no longer viable either since the trial was already under way. Moreover, the problems the Court had experienced and which motivated closure involved the in-court intimidation of the jury.

Under the "all-but-conclusive" presumption which the appellants seek to have established, it is doubtful that the accussed in this case or any case, for that matter, would be able to meet the burden of proof necessary for closure.[32] Such a constitutional straitjacket should not be foisted upon the criminal justice systems of the states without clear proof of the need for it and the effects it will have.[33]

CONCLUSION

This nation's longstanding tradition of public criminal trials is not historical accident. It is the product of the well-established constitutional rights of the accused and

[32] Admittedly, at the expense of the accused's right to a fair trial, this presumption would avoid "the costly case-by-case task of judging future closure orders." (Brief of Appellants at 61). The value of this cost-saving device is itself constitutionally suspect in view of the potential prejudice to an accused right to a fair trial.

[33] *See* Argument I, B, above. Unlike legislation which may be readily changed and which allows for effective experimentation, a constitutionally based rule is destined to be long-termed and inflexible.

responsible protection of public interests by those entrusted with the administration of criminal justice.

Foremost among our aims has been the right of the accused to a fair trial—the most basic of all freedoms. The assurance of a fair trial must continue to occupy this central place in our scheme of justice, for otherwise there is little need for the system itself. Adherence to these tried and proven principles will not, as the Appellants suggest, usher in an era of secret criminal trials.

The new constitutional rights urged in this case do not arise out of experience which reveals their necessity. The consequence of their establishment poses a myriad of imponderables that may seriously threaten the central purpose of criminal trials. It would be the ultimate irony, indeed misfortunate, if in our well-intentioned efforts to add new constitutional dimension to our proven system we threaten its most vital function.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one counsel for the Appellees in the above-captioned matter, hereby certify that three (3) copies of this brief have been served upon counsel for all parties required to be served by depositing the same in the United States Post Office with first class postage prepaid this 9th day of January, 1980.

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